Prabakaran a/l Peraisamy v Public Prosecutor

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COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO P-05–265–09 OF 2011
ABDUL MALIK ISHAK, AZHAR MA'AH AND APANDI ALI JJCA
22 AUGUST 2012

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Criminal Law — Dangerous Drugs Act 1952 — s 39B(1)(a) — Trafficking in 106.98g of dangerous drugs — Appeal against conviction and sentence — Failure to call material witness — Whether informer exceeded role of agent provocateur — Protection of informer as witness — Corroboration of agent provocateur's evidence — Whether accused had necessary mens rea possession of drugs — Presumption of trafficking — Whether High Court contradicted its own finding that element of trafficking was proven — Dangerous Drugs Act 1952 Section 37(da)

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Evidence — Adverse inference — Failure to call material witness — Corroboration of agent provocateur's evidence — Whether necessary

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With the aid of an agent provocateur ('Busra'), the police negotiated for the purchase of drugs to frame the accused. Busra was introduced to the accused by one Zaki through an informer. Busra, Zaki and the informer met on two occasions. Following the meetings and phone calls, it was finally agreed upon the parties that the drugs would be exchanged for cash at a car wash area where the accused was working. On the eventful day, the ambush party in waiting observed that the accused was holding a brown envelope while walking towards Busra. As the accused handed the envelope to Busra, the police proceeded to arrest the accused. In the High Court, the accused was convicted and sentenced to death under s 39B(1)(a) of the Dangerous Drugs Act 1952, for trafficking in 106.98g of dangerous drugs. The accused's defence was a total denial of the prosecution's case. It was contended that he had never met or spoken and that he had never known Zaki. According to the accused, one of his car wash clients had instructed him to pass the envelope to another person when he came to the car wash and he did not examine the contents of the envelope but was told that it contained computer chips. By virtue of s 90A of the Evidence Act 1950 ('the Act'), the prosecution brought forth evidence of several calls made by the accused from his mobile phone to Busra's. In the present appeal, the accused appealed against his conviction and sentence. The accused argued that the presumption of adverse inference under s 114(g) of the Act should have been invoked for the prosecution's failure to call upon Zaki and the informer to testify. It was also argued that the informer had exceeded his role and had himself became the agent provocateur. Further, the accused contended that by invoking the presumption of trafficking under s 37(da) of the DDA, the High

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Court had contradicted its own finding that the element of trafficking had been proven.

Held, dismissing appeal; affirming sentence and conviction of the High Court:

(1) The negotiations for the sale of the drugs concerned Busra and the appellant only. The available evidence all pointed to this salient feature in this case. Only these two personalities were involved in the sale of the drugs, namely, the appellant and Busra and no one else. These were solid evidence linking the appellant to Busra. It showed the negotiations for the sale of the drugs which culminated in the arrest of the appellant with the drugs in question. The learned High Court judge did not err when he concluded that there was a negotiation for the sale of the drugs between the appellant and Busra (see paras 51–52).

(2) It was crystal clear that through the evidence of Busra, the informer and Zaki were not active participants in the negotiations between Busra and the appellant and they merely served as introducers only. There was no necessity for the prosecution to call the informer or Zaki as its witnesses to prove its case under the charge or even to make them available to the defence. The adverse inference under s 114(g) of the Act should not be invoked against the prosecution for the non-calling of these personalities (see paras 55–56).

(3) The role played by the informer did not go beyond introductions and, consequently, the informer was protected under s 40 of the DDA and did not have to be called as a witness since he did not metamorphose into an agent provocateur. Section 40 of the DDA offers protection to informers generally and provides that no witness shall be obliged or permitted to disclose the name or address of any informer or state any matter which might lead to his discovery. Whether a person was an informer or an agent provocateur was purely a matter of fact (see para 57).

(4) The appellant's argument that by invoking the trafficking presumption under s 37(da) of the DDA, the learned High Court judge had contradicted his earlier finding that the evidence of trafficking had been proved, was misplaced. After the prosecution had adduced its evidence in court and in the course of assessing the evidence, the High Court judge had to ascertain whether an actual case of trafficking or a presumed case of trafficking had been proved. What the High Court judge did at this stage was merely to ascertain the mode of proof adopted by the prosecution to prove its case (see para 67).

[Bahasa Malaysia summary

Dengan bantuan ejen perangkap ('Busra'), pihak polis telah membuat perundingan untuk belian dadah bagi memerangkap tertuduh. Busra diperkenalkan kepada tertuduh oleh seorang bernama Zaki melalui pemberi

maklumat. Busra, Zaki dan pemberi maklumat telah berjumpa dua kali. Berikutan perjumpaan-perjumpaan tersebut dan beberapa panggilan telefon, pihak-pihak telah bersetuju agar dadah tersebut akan ditukarkan dengan wang tunai di kawasan mencuci kereta di mana tertuduh bekerja. Pada hari kejadian, pasukan serang hendap yang sedang menunggu telah melihat tertuduh memegang sampul surat berwarna coklat sambil berjalan menuju ke arah Busra. Semasa tertuduh menyerahkan sampul surat itu kepada Busra, pihak polis telah menangkap tertuduh. Di Mahkamah Tinggi, tertuduh telah disabitkan dan dijatuhkan hukuman mati di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 ('ADB'), kerana mengedar dadah berbahaya seberat 106.98g. Pembelaan tertuduh adalah penafian sepenuhnya terhadap kes pendakwaan. Adalah dihujahkan bahawa dia tidak pernah berjumpa atau bercakap dan tidak mengenali Zaki. Menurut tertuduh, salah seorang daripada pelanggan yang mencuci keretanya telah mengarahkannya untuk menyerahkan sampul surat itu kepada seorang yang lain apabila dia datang ke tempat mencuci kereta itu dan dia tidak memeriksa kandungan sampul surat itu tetapi diberitahu bahawa ia mengandungi cip komputer. Menurut s 90A Akta Keterangan 1950 ('Akta tersebut'), pihak pendakwaan telah mengemukakan keterangan berhubung beberapa panggilan telefon yang telah dibuat oleh tertuduh dari telefon bimbitnya kepada Busra. Dalam rayuan ini, tertuduh merayu terhadap sabitan dan hukumannya. Tertuduh berhujah bahawa andaian inferens bertentangan di bawah s 114(g) Akta tersebut patut digunakan kerana kegagalan pendakwaan memanggil Zaki dan pemberi maklumat untuk memberi keterangan. Adalah juga dihujahkan bahawa pemberi maklumat telah melampaui peranannya dan dia sendiri telah menjadi ejen perangkap. Selanjutnya, tertuduh berhujah bahawa dengan menggunakan andaian pengedaran di bawah s 37(da) ADB, Mahkamah Tinggi telah bercanggah dengan penemuannya sendiri di mana elemen pengedaran telah dibuktikan.

Diputuskan, menolak rayuan; mengesahkan hukuman dan sabitan Mahkamah Tinggi:

(1) Perundingan jualan dadah itu melibatkan Busra dan perayu sahaja. Keterangan sedia ada semuanya menunjukkan kepada elemen penting ini dalam kes ini. Hanya dua personaliti ini terlibat dalam jualan dadah itu, iaitu perayu dan Busra dan tiada yang lain. Ini adalah bukti kukuh yang mengaitkan perayu dengan Busra. Ia menunjukkan perundingan-perundingan jualan dadah itu membawa kepada tangkapan perayu dengan dadah yang dipersoalkan. Hakim Mahkamah Tinggi tidak terkhilaf apabila beliau memutuskan bahawa telah berlaku perundingan untuk jualan dadah antara perayu dan Busra (lihat perenggan 51–52).

(2) Adalah jelas melalui keterangan Busra, pemberi maklumat dan Zaki bukan peserta yang aktif dalam perundingan-perundingan antara Busra dan perayu dan mereka hanya sebagai orang yang memperkenalkan

sahaja. Tiada keperluan untuk pendakwaan memanggil pemberi maklumat dan Zaki sebagai saksi-saksi untuk membuktikan kesnya di bawah pertuduhan itu ataupun membuat mereka sedia ada untuk pembelaan. Inferens bertentangan di bawah s 114(g) Akta tersebut tidak patut digunakan terhadap pendakwaan kerana tidak memanggil personaliti-personaliti tersebut (lihat perenggan 55–56).

(3) Peranan yang dimainkan oleh pemberi maklumat tidak melebihi pengenalan dan, berikutan itu, pemberi maklumat adalah dilindungi di bawah s 40 ADB dan tidak perlu dipanggil sebagai saksi kerana dia tidak bertindak sebagai ejen perangkap. Seksyen 40 ADB menawarkan perlindungan kepada pemberi maklumat pada amnya dan memperuntukkan bahawa tiada saksi akan diwajibkan atau dibenarkan mendedahkan nama atau alamat mana-mana pemberi maklumat atau menyatakan apa-apa perkara yang mungkin akan membawa kepada penemuannya. Sama ada seseorang itu pemberi maklumat atau ejen perangkap adalah semata-mata perkara berdasarkan fakta (lihat perenggan 57).

(4) Hujah perayu bahawa dengan menggunakan andaian pengedaran di bawah s 37(da) ADB, hakim Mahkamah Tinggi telah bercanggah dengan penemuan awal beliau bahawa keterangan pengedaran telah dibuktikan itu, adalah tidak wajar. Setelah pendakwaan mengemukakan keterangannya di mahkamah dan dalam proses meneliti keterangan itu, hakim Mahkamah Tinggi perlu menentukan sama ada kes sebenar pengedaran atau andaian kes pengedaran telah dibuktikan. Apa yang dilakukan oleh hakim Mahkamah Tinggi di peringkat ini hanyalah untuk menentukan cara pembuktian yang digunakan oleh pendakwaan untuk membuktikan kesnya (lihat perenggan 67).]

Notes

For cases on failure to call material witness, see 7(1) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 211–231.

For cases on s 39B(1)(a), see 4(1) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 481–669.

Cases referred to

(1) Namasiyiam (2) Rajindran (3) Goh Chin Peng, and (4) Ng Ah Kiat v PP [1987] 2 MLJ 336,SC (refd)

Abdullah Zawawi bin Yusoff v PP [1993] 3 MLJ 1, SC (refd)

Abu Bakar v Regina [1963] 1 MLJ 288, ACRJ (refd)

Balachandran v PP [2005] 2 MLJ 801; [2005] 1 CLJ 85, FC (refd)

Director of Public Prosecutions v Brooks [1974] 2 All ER 840, FC (refd)

Goh Ah Yew v PP [1949] MLJ 150, Crim App (refd)

Kamalahassan a/l Latchimanan v Pendakwa Raya [2008] 3 MLJ 810, CA (refd)

Looi Kow Choi & Anor v PP [2003] 2 MLJ 65; [2003] 1 CLJ 734, CA (refd)

Munusamy v PP [1987] 1 MLJ 492, SC (refd)
Pendakwa Raya v Nik Ahmad Aman bin Nik Mansor [2002] 5 MLJ 641; [2002] 2 AMR 2515, HC (refd)
PP v Chia Leong Foo [2000] 6 MLJ 705; [2000] 4 CLJ 649, HC (refd)
PP v Krishnan a/l Letchumanam & Anor [2005] 7 MLJ 403, HC (refd)
PP v Johar bin Mustafa [2003] MLJU 342; [2004] 5 CLJ 187, HC (refd)
PP v Mohamed Halipah [1982] 1 MLJ 155, OCRJ (refd)
PP v Mohd Radzi bin Abu Bakar [2005] 6 MLJ 393 ; [2006] 1 CLJ 457, FC (refd)
PP v Sa'ari bin Jusoh [2007] 2 MLJ 409 ; [2007] 2 CLJ 197, FC (folld)
Ti Chuee Hiang v PP [1995] 2 MLJ 433, SC (refd)
Wan Yurillhami bin Wan Yaacob & Anor v PP [2010] 1 MLJ 749; [2010] 1 CLJ 17, FC (refd)

Legislation referred to

Dangerous Drugs Act 1952 ss 12(2), 37(da), 39A(2), 39B(1)(a), (2) 40, 40(1), 40A(1)
Evidence Act 1950 ss 90A, 114(g)

Appeal From: Criminal Case No 45-22 of 2010 (High Court, Pulau Pinang)

Dato' K Kumaraendran (Kumar & Co) for the appellant accused.
Shoba Venu Gobal (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent/prosecution.

Abdul Malik Ishak JCA (delivering judgment of the court):

INTRODUCTION

[1] The appellant was charged, tried and convicted of an offence of trafficking in dangerous drugs punishable under s 39B(2) of the Dangerous Drugs Act 1952 ('DDA'). He was sentenced to death. The charge against the appellant reads as follows:

> Bahawa kamu bersama-sama dua orang yang masih bebas lagi, pada 22 Oktober 2009 jam lebih kurang 8.10 malam, di Perkarangan Tempat Cuci kereta Suhaki Enterprise, No: 1654, Jalan Besar Permatang Tinggi, Bukit Tengah, Bukit Mertajam, di dalam Daerah Seberang Perai Tengah, di dalam Negeri Pulau Pinang, telah memperedarkan dadah berbahaya iaitu sejumlah berat 124.81 gram (17.83 gram heroin dan 106.98 gram monoacetylmorphines) dan dengan itu kamu telah melakukan satu kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah seksyen 39B(2) Akta yang sama dan dibaca bersama seksyen 34 Kanun Keseksaan.

A THE PROSECUTION'S CASE

[2] As directed, D/SI Busra (SP4 — hereinafter referred to as 'Busra'), an agent provocateur, was introduced by an informer to a person by the name of Zaki who stayed in Pantai Remis and who knew about the heroin trafficking activity in the area of Bukit Tengah, Bukit Mertajam, Pulau Pinang. The introduction took place on 11 March 2009 at about 5pm at Pantai Remis. In that brief meeting, Zaki promised to introduce the informer and Busra to Kumar on that very night itself.

[3] On 11 March 2009 at about 8.30pm, all three of them went to Zamrud restaurant at Bukit Tengah, Bukit Mertajam. There Zaki telephoned Kumar. Not long thereafter, a male Indian riding a Honda EX5 motorcycle bearing registration No PGP 5371 arrived at the said restaurant. Zaki then introduced the male Indian as Kumar (hereinafter referred to as the 'appellant') to both Busra and the informer. Busra introduced himself as Abang Man. The appellant then invited them to go to a Chinese restaurant to discuss because according to the appellant it was not safe to be in Zamrud restaurant.

[4] In the Chinese restaurant, discussions were conducted between Busra and the appellant. The appellant discussed about the sale and purchase of one pound of heroin at the price of RM11,000. If purchases exceeded two pounds, then the price of one pound would be reduced to RM10,000. The discussions did not involve the informer and Zaki. After the discussion, Busra returned to Taiping and briefed Inspector Saifulazre about the whole matter.

[5] On 22 March 2009 at about 10am, the informer contacted Busra and told him that the appellant wanted to see Busra on that night itself. Busra then informed Inspector Saifulazre about the latest development. The said Inspector directed Busra to proceed to Bukit Tengah, Bukit Mertajam with the informer in order to meet the appellant.

[6] On 22 March 2009 at about 7pm, Busra together with the informer proceeded from Taiping to Trong in order to fetch Zaki before proceeding to Bukit Tengah, Bukit Mertajam, Pulau Pinang.

[7] There, all of them met the appellant at the car wash area at Bukit Tengah, Bukit Mertajam. In that meeting, both Busra and the appellant discussed about the supply of heroin wherein the appellant agreed to supply five pounds of heroin at the price of RM10,000 per pound. Busra requested the appellant to deliver the drugs to R & R Hentian Gunung Semanggol, Perak but the appellant refused to agree because according to the appellant the area was said to be unsafe. In that meeting where both the appellant and Busra discussed about the heroin supply, the informer and Zaki were within the vicinity of the

car wash and they took no part in the discussion. It was during this meeting that the telephone Nos of the appellant and Busra were exchanged. The appellant gave two telephone Nos to Busra, namely, 016 4704434 and 012 4999642. While Busra gave his telephone No 019 5570718 to the appellant. And Busra said that he would call the appellant when he was ready to take the supply. After the meeting, Busra together with the informer and Zaki returned to Perak. On the way back, Zaki was sent to Trong and upon arrival at Taiping, Busra reported the events that took place at Bukit Tengah, Bukit Mertajam to Inspector Saifulazre.

[8] Thereafter there were several telephone calls exchanged between the appellant and Busra.

[9] On 9 October 2009, the appellant contacted Busra and enquired when would Busra collect the drugs as discussed on 22 March 2009. Busra told the appellant that he might collect the drugs before or after Deepavali. Thereafter, Busra informed Inspector Saifulazre about what had transpired.

[10] ASP Md Salleh bin Abas (SP5) testified that he told Inspector Saifulazre that the 'Ketua Jabatan Siasatan Jenayah (KJSJ)', Perak agreed that the project would continue in Pulau Pinang and KJSJ Pulau Pinang had been contacted.

[11] On 11 Octrober 2009 at about 8.10pm, Busra received a telephone call from the appellant who enquired and sought for a confirmation about the date and time. Busra informed the appellant that he was coming on 22 October 2009 at about 8pm.

[12] Again, on 18 October 2009, Busra received a telephone call from the appellant who enquired whether Busra would be coming on 22 October 2009 to collect the five pounds of drugs as discussed earlier. Busra then called the appellant and confirmed that he would collect the drugs on 22 October 2009 and asked that the price be reduced. But the appellant refused and maintained the price at RM10,000 per pound. Busra agreed to that price and the appellant reminded Busra to come early before dark on 22 October 2009 on the ground that anything could happen when the day gets dark.

[13] On 22 October 2009 at about 12.35pm, the appellant telephoned Busra and sought for confirmation to come and collect the drugs. At about 1.30pm of the same day, Busra telephoned the appellant and the latter enquired as to how many people would be coming. Busra replied that he would be coming with his people in order to introduce them to the appellant. The appellant agreed. Busra told the appellant that upon arrival at Bukit Tengah, he would be waiting at the BHP petrol station. The appellant disagreed. The appellant requested Busra to come to the car wash area at Suhaki Enterprise.

Busra agreed and he then told Inspector Saifulazre about the whole matter. After discussion with SP5, it was agreed that the police party from Perak comprising of 17 police personnel and officers were directed to proceed to the R & R Juru, Pulau Pinang at 3pm to be on duty.

[14] On 22 October 2009, 17 police personnel and officers from Perak proceeded to Pulau Pinang to attend the joint briefings. It was decided that Detective Corporal Rosniwati bt Remle and Detective Lance Corporal Mohd Rizal bin Othman were to assist Busra. SP5 gave RM50,000 (in denominations of RM100) to Busra as show money and the latter kept it in his waist pouch bag. At about 5.45pm, the police personnel from Perak and Pulau Pinang arrived and they congregated at R & R Juru, for the final briefing. During the briefing, SP5 detailed the duties of the police personnel. That Busra was to be the agent provocateur and he would be assisted by Detective Corporal Rosniwati bt Remle and Detective Lance Corporal Mohd Rizal bin Othman. That Busra would be provided with RM50,000 as show money. That Busra would arrest the appellant once the heroin supply was available and that he was to shout 'Polis' as a signal to arrest the appellant. That Busra and his two assistants would be using a Proton Perdana motorcar bearing registration number ACX 3898. The police parties were divided into four teams, namely:

(a) the team led by SP5 together with three police personnel using a police vehicle;

(b) the team led by Inspector Saifulazre with three police personnel using a police vehicle;

(c) the team that used the van; and

(d) the motorcycle team.

[15] After the briefing, the first and the second teams proceeded to check and familiarise themselves with the target area at Permatang Tinggi, Bukit Tengah, Bukit Mertajam. That was a car wash place located by the side of the road. SP5 directed Detective Corporal Zamri bin Mat Desa ('SP8') to be located in front of the car wash centre in the bushes across the street to make an observation. SP5 then directed the police party to return to the R & R Juru. At about 7.30pm, the ambush party left for the target location before Busra and his assistants arrived at the target location.

[16] At about 7.50pm on 22 October 2009, Busra with two of his assistants left for the target location in the Proton Perdana ACX 3898. On his way there, Busra received a telephone call from the appellant who enquired as to the number of persons Busra was bringing. Busra told the appellant that he would be bringing his girl friend as well. On hearing this, the appellant enquired 'teman wanita atau lalat ke Abang?' Busra retorted, 'Saya punya teman wanita,

apa takut, ini lu punya tempat'. The appellant then replied 'OK'. The appellant also gave the direction, 'sampai di tempat cuci kereta terus masuk' and Busra replied, 'OK'.

[17] On arrival at the car wash area, the appellant was already waiting. Busra parked the motorcar which he drove below the camp which was facing the main road of Bukit Tengah. Busra and Detective Corporal Mohd Rizal bin Othman alighted from the motorcar and Busra introduced the said detective as Busra's right hand man to the appellant. The appellant then asked, 'Duit cukup ke bang'. The appellant said that he wanted to see the money. Busra then invited the appellant and Detective Corporal Mohd Rizal bin Othman to enter the back seat of the Proton Perdana ACX 3898. Busra himself entered at the driver's side. Busra then introduced Detective Corporal Rosniwati bt Remle who sat at the front passenger seat to the appellant. Busra then directed Detective Corporal Mohd Rizal bin Othman to take the waist pouch bag that was kept below the driver's seat and show it to the appellant. This was done when the appellant was seen holding the waist pouch bag and took out five bundles of RM100 notes tied together with a rubber band totalling RM50,000. The appellant counted the moneys and remarked that he wanted to check the serial numbers of the notes. Having done that, the appellant then put back the moneys inside the waist pouch bag and returned it to Detective Corporal Mohd Rizal bin Othman.

[18] Busra then asked the appellant, 'Mana barang, saya mahu tengok?'. The appellant said that he would telephone his friend. After telephoning his friend, the appellant said, 'Barang ada 4 1/2 sahaja. Jadi Abang asingkan RM5,000.00'. Busra then took out RM5,000 from his waist pouch bag. The appellant then received a telephone call and he spoke in the Tamil language. The appellant then said that a short while later the supply would come. And the appellant then alighted from the motorcar to fetch the drugs. The appellant was seen walking towards the main road and turning to the left side of the road. Busra and his two assistants waited behind the Proton Perdana motorcar. It was at this time that SP8 who was located in front of the car wash centre in the bushes across the street saw a Honda Civic motorcar arrived and stopped by the side of the road. The appellant was seen approaching the Honda Civic motorcar and taking a package from inside the Honda Civic motorcar ('telah mengambil satu bungkusan dari dalam kereta Honda Civic tersebut'). As soon as the appellant had taken the package from the Honda Civic motorcar, the said motorcar drove away. The appellant was seen holding the package in his hand and walking towards the car wash area. At the same time SP8 contacted the rest of the police party via walkie-talkie and relayed the information pertaining to the Honda Civic motorcar and the package that was taken by the appellant.

[19] About three minutes later, Busra saw the appellant entering the car wash area. The appellant was still walking and this time Busra saw the appellant holding onto something on his right hand. As soon as the appellant passed the gate to the car wash area, the appellant was seen placing something which he held in his right hand on top of his head and was walking towards Busra. When the appellant was nearing Busra, the appellant was seen raising both his hands to his head and took a brown coloured envelope from his head and handed it to Busra.

[20] Upon receipt of the brown coloured envelope Busra placed it on top of the Proton Perdana car boot. Busra then examined the contents of the brown coloured envelope and he found that there were nine packages and Busra merely squeezed its contents. Busra then placed the nine packages back into the brown coloured envelope and handed it back to the appellant. While asking the appellant to wait while he fetched the money, Busra quickly approached the appellant and arrested him by gripping the appellant's neck and shouting 'Polis'. That was the pre-requisite signal for SP5 and his police party to move in and assist Busra in arresting the appellant.

[21] The appellant struggled to free himself ('dan masa itulah OKT meronta-ronta untuk melepaskan diri') but he was eventually subdued.

[22] SP5 seized the brown coloured envelope from the hand of the appellant and examined its contents in the presence of the appellant and the police party. Substances suspected to be heroin were recovered.

[23] In due course, the government chemist Sukhairi bin Samsudin ('SP3') analysed and confirmed the contents of the brown coloured envelope to be dangerous drugs, to wit, 124.81g (17.83g of heroin and 106.98g of monoacetylmorphines).

PRIMA FACIE CASE

[24] As a decider of both law and fact, the learned High Court judge evaluated on a maximum basis the evidence of the prosecution to ascertain whether a prima facie case has been proven in accordance with *Looi Kow Choi & Anor v Public Prosecutor* [2003] 2 MLJ 65; [2003] 1 CLJ 734, CA; and *Public Prosecutor v Mohd Radzi bin Abu Bakar* [2005] 6 MLJ 393; [2006] 1 CLJ 457, FC. Without a doubt there was a 'positive evaluation' (*Balachandran v Public Prosecutor* [2005] 2 MLJ 801; [2005] 1 CLJ 85, FC) of the evidence undertaken by the learned High Court judge pertaining to the value of the prosecution's evidence. The evidence must be credible on every essential ingredient of the offence.

[25] Indeed the impeccable analysis of the prosecution's evidence by the learned High Court judge made our task easier. It reflects the judicial thinking of the learned High Court judge in the person of justice Dato' Zamani bin A Rahim. This was what His Lordship said at pp 118–121 of the appeal record at *Jilid* 1:

> Keterangan di atas menunjukkan keterlibatan OKT dalam urusan jual-beli dadah melalui keterangan-keterangan berikut:
>
> (1) Terdapat perbincangan jualan dadah yang dirundingkan terlebih dahulu di antara D/SI Busra (AP) dan OKT.
>
> (2) Keterangan D/SI Busra (AP) menyatakan terdapat urusan tawar-menawar harga yang akhirnya bersetuju dengan harga satu paun RM10,000.00.
>
> (3) Perbuatan OKT yang masih menghubungi D/SI Busra (AP) menunjukkan niat OKT untuk menjual dadah heroin yang diminta oleh D/SI Busra (AP).
>
> (4) OKT minta D/SI Busra (AP) datang ke tempatnya iaitu Suhaki Enterprise. Tidak ada orang lain di dalam kawasan itu.
>
> (5) Sampul surat tersebut yang mengandungi dadah dipegang oleh OKT. Dan perbuatan OKT mengira wang RM50,000.00 di dalam kereta D/SI Busra (AP) sebelum penyerahan dadah.
>
> Oleh itu, dengan jelas menunjukkan bahawa wujud 'act of selling' yang mana termasuk takrif 'pengedaran' dadah di bawah seksyen 2 Akta. Dalam kes Mahkamah Persekutuan *Public Prosecutor v Sa'ari Jusoh* [2007] 2 MLJ 409; [2007] 2 CLJ 197, Abdul Aziz Mohamad FCJ berkata:
>
> > 'For my part, in considering the dictionary meaning of 'sell' for the purpose of determining the ordinary meaning of 'selling' in the definition of 'trafficking', I would reject Webster's meaning No. 2, without having to resort to the existence of paras (b) and (c) of section 39B(1), as one that could not have been intended by the legislature. The meaning intended is meaning No. 1, which for the present case is 'to … deliver… goods… for money'. So long as the delivery is for money - which the delivery in this case was - as opposed to delivery as a gift or on some other basis, it is selling even though the money for which the goods are delivered has not passed to the seller.'
>
> Pada masa yang sama OKT mempunyai pemilikan sebenar atau pemilikan mens rea ke atas dadah yang menjadi intipati pertuduhan ke atasnya. Memandangkan berat dadah berbahaya itu adalah 124.81 gram (17.83 gram heroin dan 106.98 gram monoacetylmorphines) melebihi berat dalam statut, maka anggapan pengedaran di bawah seksyen 37(da) terpakai. Dalam kes *Public Prosecutor v Johar bin Mustafa* [2003] MLJU 342; [2004] 5 CLJ 187 tidak menghalang mahkamah untuk menerimapakai anggapan pengedaran di bawah seksyen 37(da) secara bersama dengan pengedaran sebenar (actual trafficking) di bawah seksyen 2 Akta Dadah Berbahaya, 1952.

Saya tidak menerima penghujahan peguam terpelajar bahawa tidak ada apa-apa rundingan atau urusan jual-beli dadah di antara D/SI Busra (AP) dan OKT sebelum tangkapan dibuat ke atas OKT. Keterangan D/SI Busra (AP) mengenai rundingan jual-beli dadah dengan OKT tidak meragukan. D/SI Busra (AP) adalah seorang saksi yang boleh dipercayai.

Dan juga kegagalan memanggil ASP Mohd. Salleh dan Zaki dari Pantai Remis tidak juga menjejaskan kes pihak pendakwaan.

3) Keputusan di akhir kes pendakwaan

Di akhir kes pendakwaan, setelah mendengar keterangan saksi-saksi pendakwaan dan menilainya secara maksima berdasarkan kes Mahkamah Rayuan *Looi Kow Choi & Anor v Public Prosecutor* [2003] 2 MLJ 65; [2003] 1 CLJ 734 dan kes Mahkamah Persekutuan *Public Prosecutor v Mohd. Radzi bin Abu Bakar* [2005] 6 MLJ 393; [2006] 1 CLJ 457, saya memutuskan pihak pendakwaan telah berjaya mengasaskan satu kes prima facie terhadap OKT di atas kesalahan mengedar dadah seberat 124.81 gram (17.83 gram heroin dan 106.98 gram monoacetylmorphines) secara sebenar (actual trafficking) di bawah seksyen 2 Akta Dadah Berbahaya, 1952.

Seterusnya atau secara alternatif, saya berpuashati OKT mempunyai pemilikan sebenar atau pemilikan mens rea ke atas dadah tersebut sepertimana yang dinyatakan dalam kes *Toh Ah Loh & Mak Thim v Rex* [1949] 1 MLJ 54; [1948] 1 LNS 72 dan *Saad Ibrahim v Public Prosecutor* [1968] 1 MLJ 158; [1967] 1 LNS 154. Oleh kerana berat bersih dadah tersebut adalah 124.81 gram (17.83 gramheroin dan 106.98 gram monoacetylmorphines) melebihi berat yang ditetapkan oleh statut, pihak pendakwaan juga telah berjaya membangkitkan anggapan pengedaran di bawah seksyen 2 Akta Dadah Berbahaya, 1952.

Oleh itu, OKT dipanggil membela diri sepertimana pertuduhan.

THE DEFENCE

[26] The appellant gave his evidence under oath and he opted to speak in the Tamil language. The appellant testified as follows. That prior to 22 October 2009, he never met nor discussed with anyone at any place in regard to the sale and purchase of drugs.

[27] That he has heard the evidence of Busra in court. But he never met personally with Busra or spoke to Busra over the telephone.

[28] That he never met Busra in Zamrud restaurant or anywhere else before 22 October 2009.

[29] That on 22 October 2009 at about 8pm, his friend by the name of Chan came to see him at the car wash. Chan was said to be the appellant's client. At

that time Chan handed over to the appellant a brown coloured envelope and told the appellant that the said envelope contained computer chips and Chan asked the appellant to hand over the said envelope to Ravi when Ravi visited the appellant's car wash. The appellant said that he did not examine the contents of the said envelope.

[30] After the appellant received the said envelope from Chan, Chan then left in his own motorcar. When the appellant wanted to re-enter his car wash premises, suddenly a black coloured Proton Perdana motorcar arrived. The appellant was ambushed and was arrested.

[31] Before the appellant was arrested, he did not know the contents of the said envelope. When the appellant was arrested, Ravi was not at the car wash area.

[32] When the appellant was arrested, Busra was there. That was the first time, according to the appellant, that he met Busra. He said that he has no friend in Pantai Remis like Zaki or anyone else.

[33] According to the appellant, Chan used to hand over to the appellant a transparent plastic bag containing computer chips to be handed over to Ravi.

[34] Under cross-examination, the appellant admitted that he was arrested at the car wash at Suhaki Enterprise. He also agreed that the telephone No 014 4704434 belonged to him. He said that he did not know how Busra's telephone No 019 5570718 was listed in his telephone No 014 4704434 as one of the calls made by him. When it was put to the appellant that the appellant had discussed with Busra pertaining to the sale and purchase of the drugs over the telephone, the appellant disagreed.

[35] When the learned High Court judge asked for the telephone No of the appellant, the appellant gave it as 016 4704434.

[36] Still under cross-examination, the appellant testified as follows. That he used to receive from Chan, computer chips placed in a transparent plastic bag. And he said that he could see its contents. He said that he could not feel the contents of the brown coloured envelope on that fateful night because he was ambushed and was arrested. He agreed that Chan never quarrelled with him. He said that Ravi was Chan's friend. It was then put to him that since Ravi was Chan's friend, it was better for Chan to hand over the computer chips direct to Ravi. He replied that Chan sought for his help to hand over the computer chips to Ravi because Chan's child was sick and Chan had to send his child to the hospital.

[37] The prosecution continued to cross-examine the appellant along these lines:

(a) that the appellant was dealing with Busra for the sale of 4½ pounds of drugs;

(b) that it was because of his dealings in the sale and purchase of the drugs that the police in Perak had arrested him;

(c) that the appellant knew about the contents of the brown coloured envelope;

(d) that the appellant knew Busra through the appellant's friend by the name of Zaki who hailed from Pantai Remis;

(e) that the appellant's story that Chan had handed to the appellant the envelope containing computer chips for delivery to Ravi was not true; and

(f) that the arrest of the appellant and the seisure of the drugs were as a result of the discussion and meeting with Busra.

[38] However, the appellant disagreed with all these suggestions.

[39] There was no re-examination of the appellant's evidence by learned defence counsel. With that, the defence closed its case.

ANALYSIS

[40] Only two major issues were raised by learned defence counsel in this appeal. The first concerned the question of whether the informer or Zaki should be called. The second concerned the invocation of s 37(da) of the DDA by the learned High Court judge. We shall now deal with these two issues, one after the other.

THE FIRST ISSUE

[41] Dato' K Kumaraendran for the appellant argued that the informer did not behave like a mere introducer but was present throughout both the meetings between Busra and the appellant. It was submitted that there was nothing in the evidence of Busra that showed that during the first meeting in the Chinese restaurant, both the informer and Zaki did not sit at the same table. So it was submitted that this court could make a safe assumption that both the informer and Zaki had knowledge of everything that transpired throughout the first meeting in the Chinese restaurant. It was emphasised that the appellant and Busra were complete strangers and it was improbable for the

appellant to discuss with Busra about the drug transactions. Learned defence counsel posed two questions, namely:

(a) why did the informer and Zaki did not make an exit after introducing the appellant to Busra?; and

(b) why were they present throughout the entire time in the Chinese restaurant?

[42] Busra provided the answer in his examination-in-chief pertaining to the roles played by both the informer and Zaki at the first meeting in the Chinese restaurant. This was what Busra said at p 31 of the appeal record at *Jilid* 1:

> Walaupun Zaki dan sumber ada sama di Restoran Cina itu, tetapi mereka tidak mencampuri perbincangan saya dan OKT.

[43] Learned defence counsel then drew our attention to the second meeting and he asked this question, 'Why did both the informer and Zaki follow Busra in the second meeting?' According to learned defence counsel, it should have been sufficient for Zaki to pass the message to the informer who in return would pass the message to Busra stating that the appellant wanted to meet Busra. But alas both the informer and Zaki accompanied Busra during the second meeting on 22 March 2009. It was emphasised that it was difficult to accept that the informer and Zaki did nothing but just linger around the 'car wash' area while Busra and the appellant were discussing about the supply of the drugs.

[44] Again, Busra aptly described the roles of both the informer and Zaki at the second meeting in these re-assuring words (see p 32 of the appeal record at *Jilid* 1):

> Dalam perjumpaan tersebut saya dan OKT telah berbincang sekali lagi mengenai bekalan dadah heroin. Waktu ini, sumber dan Zaki ada dalam kawasan 'car wash' tersebut. Sumber dan Zaki tidak terlibat dalam perbincangan antara saya dan OKT.

[45] At this juncture, learned defence counsel drew our attention to three authorities, namely:

(a) *Kamalahassan a/l Latchimanan v Pendakwa Raya* [2008] 3 MLJ 810 (CA);

(b) *(1) Namasiyiam (2) Rajindran (3) Goh Chin Peng, and (4) Ng Ah Kiat v Public Prosecutor* [1987] 2 MLJ 336 (SC); and

(c) *Public Prosecutor v Krishnan a/l Letchumanam & Anor* [2005] 7 MLJ 403 (HC).

[46] It was also submitted by learned defence counsel that the informer has crossed the line from that of an informer to that of an agent provocateur and thus the prosecution ought to have called the informer to show the unfolding of the events prior to the arrest of the appellant. That being the case, it was submitted that the informer was a material witness and the failure on the part of the prosecution to call him would attract the adverse inference presumption under s 114(g) of the Evidence Act 1950.

[47] In so far as Zaki was concerned, it was the defence's case that the appellant never met Busra or Zaki or the informer. In short, the appellant denied that there was any meeting with them entirely. That being the case, it was argued that it was incumbent for the prosecution to call Zaki for corroborative evidence. It was also argued that Zaki could have been the supplier of the drugs and yet he was not called to negate his involvement in the case. It was further argued that Zaki should have been called as he was a witness to the two meetings and would certainly aid in the unfolding of the prosecution's case.

[48] A submission was made that based on Busra's evidence, Zaki has now mysteriously disappeared and in all probability he is a co-accused in the charge against the appellant. It must be recalled that according to Busra, Zaki has disappeared and is still at large. And according to the investigating officer Inspector Siti Nurshida bt AN ('SP9'), Zaki has to be protected as such no further action was taken against him. Flowing from this, learned defence counsel argued that the whereabouts of Zaki was known and as such Zaki ought to have been called or even offered as a witness to the defence. We were asked to make an inference that there is a possibility that there is a withholding and suppression of evidence. Towards this end, the case of *Munusamy v Public Prosecutor* [1987] 1 MLJ 492 was referred. There Mohamed Azmi SCJ, delivering the judgment of the Supreme Court, had this to say at p 494 of the report:

> It is essential to appreciate the scope of s 114(g) lest it be carried too far outside its limit. Adverse inference under that illustration can only be drawn if there is withholding or suppression of evidence and not merely on account of failure to obtain evidence. It may be drawn from withholding not just any document, but material document by a party in his possession, or for non-production of not just any witness but an important and material witness to the case.

[49] It was further argued, by way of a corollary, that Detective Corporal Rosniwati bt Remle and Detective Lance Corporal Mohd Rizal bin Othman — the two assistants to Busra, who were part of the operation were not called to verify the unfolding of the prosecution's case. Learned defence counsel cited

the following authorities to augment his submissions before us:

(a) *Ti Chuee Hiang v Public Prosecutor* [1995] 2 MLJ 433 (SC);

(b) *Abu Bakar v Regina* [1963] 29 MLJ 288 (HC);

(c) *Goh Ah Yew v Public Prosecutor* [1949] 15 MLJ 150; Appelate Criminal Jurisdiction; and

(d) *Abdullah Zawawi bin Yusoff v Public Prosecutor* [1993] 3 MLJ 1 (SC).

[50] We were urged to find the appellant guilty for possession of the dangerous drugs under s 12(2) of the DDA and punishable under s 39A(2) of the DDA.

[51] We have perused through the evidence with a fine toothcomb, and it is our judgment that the negotiations for the sale of the drugs concerned Busra and the appellant only. The available evidence all pointed to this salient feature in this case. Only these two personalities were involved in the sale of the drugs, namely, the appellant and Busra and no one else. We shall now refer to the evidence in cold print:

(a) In regard to the first meeting in the Chinese restaurant at Bukit Mertajam on 11 March 2009, Busra had this to say in his evidence at p 31 of the appeal record at *Jilid* 1:

> Sebaik sampai di Restoran Cina tersebut, saya dan OKT telah berbincang mengenai bekalan dadah heroin. OKT sanggup untuk membekalkan dadah heroin kepada saya pada bila-bila masa tetapi saya hendaklah memberitahu kepada OKT lebih awal. Dalam perbincangan tersebut, OKT memberitahu harga untuk satu pound heroin ialah RM11,000.00 dan sekiranya saya membeli lebih dari satu pound, OKT menurunkan harga kepada RM10,000.00 pada satu pound.

And, as alluded to earlier, at this first meeting both Zaki and the informer did not participate in the discussion between the appellant and Busra.

(b) In regard to the second meeting that took place in the 'car wash' at the Auto City, Bukit Tengah, Bukit Mertajam on 22 March 2009, at 8.30pm, Busra had this to say in his evidence at pp 32–33 of the appeal record at *Jilid* 1:

> Dalam perbincangan OKT bersetuju untuk membekalkan kepada saya bekalan heroin sebanyak 5 pound dengan harga RM10,000.00 pada setiap pound. Saya ada meminta OKT supaya dia dapat hantar bekalan tersebut ke Hentian Bukit Semanggol iaitu R & R Lebihraya Utara/Selatan, tetapi OKT enggan berbuat demikian dengan alasan kawasan di Perak adalah panas. Maksudnya banyak tangkapan dibuat oleh pihak polis. Saya akur dengan keputusan OKT dan OKT minta saya datang mengambil bekalan tersebut di 'car wash' itu.

TPR: Rujuk gambar, P30 hingga R.

Inilah gambar P30 hingga R yang menunjukkan tempat 'car wash' yang saya berjumpa dengan OKT.

Dalam perjumpaan ini juga, saya ada tukar-menukar nombor telefon dengan OKT, OKT memberi 2 nombor telefon bimbitnya iaitu 016-4704434 dan 012-4999642. Saya telah berikan nombor telefon saya 019-5570718. Saya beritahu OKT akan menelefonnya bila saya sudah bersedia untuk mengambil bekalan dadah darinya.

And, as alluded to earlier, at this second meeting both Zaki and the informer did not participate in the discussion between the appellant and Busra.

(c) In regard to the appellant who telephoned Busra on 9 October 2009 at about 7.30pm and enquired as to when Busra would collect the drugs from the appellant, the evidence of Busra at p 33 of the appeal record at *Jilid* 1 showed knowledge on the part of the appellant in 'supplying' the drugs to Busra within the ambit of the meaning of 'trafficking' in s 2 of the DDA. This was what Busra testified:

Pada 9.10.2009, jam lebih kurang 7.30 malam, saya telah terima panggilan dari OKT. OKT bertanya saya 'bila hendak datang mengambil bekalan'. Saya beritahu OKT 'saya akan ambil bekalan tersebut mungkin sebelum hari Deepavali iaitu 16.10.2009 atau selepas Deepavali iaitu 18.10.2009'. Perkara ini saya maklumkan kepada Inspektor Saifulazre dan minta beliau maklumkan perkara ini kepada Ketua JSJN, Perak.

(d) Another telephone call from the appellant which was received by Busra. This was on 11 October 2009 at about 8.10am enquiring as to when Busra would come to collect the drugs. This evidence came from Busra as seen at p 34 of the appeal record at *Jilid* 1:

Pada 11.10.2009, jam lebih kurang 8.10 malam, saya menerima telefon dari OKT, OKT bertanya saya 'bila saya hendak datang mengambil dadah'. Saya beritahu OKT 'saya akan datang pada 22.10.2009, jam lebih kurang 8.00 malam'. OKT memberitahu saya supaya jangan datang lewat pada jam 8.00 malam dengan alasan, apabila cuaca sudah gelap, apa-apa boleh terjadi. Saya beritahu OKT saya akan datang selewat-lewatnya jam 8.00 malam. Sekali lagi saya maklumkan kepada Inspektor Saifulazre.

(e) Yet another telephone call from the appellant to Busra on 18 October 2009 at about 9.45pm enquiring as to the amount of heroin that Busra wanted the appellant to supply. This was what Busra testified at p 34 of the appeal record at *Jilid* 1:

Pada 18.10.2009, jam lebih kurang 9.45 malam, saya terima panggilan telefon dari OKT menanya saya 'berapa banyak saya hendak bekalan heroin darinya'. Saya beritahu '5 pound' dan OKT bersetuju. Saya cuba menawar

harga tersebut tetapi OKT tidak bersetuju. Harga masih kekal RM10,000.00 pada setiap pound. Saya maklumkan perkara itu kepada Inspektor Saifulazre.

(f) Again, another telephone call from the appellant to Busra on 22 October 2009 at about 12.30pm seeking confirmation that Busra would be coming on the night of 22 October 2009 at about 8pm and enquiring as to the number of persons that would accompany Busra and suggesting to Busra that it would be better to come to the car wash area as per the charge. Busra testified at pp 34–35 of the appeal record at *Jilid* 1 to the following effect:

> Pada 22.10.2009 lebih kurang jam 12.30 tengah hari, saya terima panggilan telefon dari OKT, OKT bertanya saya 'sama ada confirm saya akan datang pada malam 22.10.2009 jam 8.00 malam'. Saya beritahu OKT 'confirm saya akan datang'. OKT bertanya 'Abang datang berapa orang'. Saya beritahu saya akan datang bersama seorang iaitu orang saya untuk kenalkan kepada OKT dengan tujuan, lain kali saya tidak dapat datang mengambil bekalan dari OKT, saya akan arah orang saya untuk datang mengambil dadah. OKT setuju dengan permintaan saya itu. Seterusnya saya beritahu OKT sebaik sampai di Bukit Tengah, saya akan tunggu OKT di station minyak BP. OKT tidak bersetuju dengan permintaan saya kerana di station minyak BP itu ramai orang, macam-macam boleh jadi. OKT beritahu saya supaya saya datang terus ke 'car wash' tempatnya. Saya bersetuju. Saya maklumkan kepada Inspektor Saifulazre dan dia arah saya hadir ke JSJN, Perak (hari sama) jam lebih kurang 3.00 petang.

(g) On 22 October 2009 at about 7.30pm, on the way to the car wash, the appellant received a telephone call from the appellant. This was what Busra testified at p 36 of the appeal record at *Jilid* 1:

> Dalam perjalanan dari R & R, Juru ke Bukit Tengah, saya terima panggilan telefon dari OKT, OKT bertanya saya 'Abang datang berapa orang'. Saya beritahu 'saya datang dengan orang saya', seperti yang saya beritahu sebelum ini dan juga bersama teman wanita saya.

(h) Finally, on 22 October 2009 at about 8pm, Busra met the appellant at the place as stated in the charge.

[52] In our judgment, these are solid evidence linking the appellant to Busra. It showed the negotiations for the sale of the drugs which culminated in the arrest of the appellant with the drugs in question. Thus, the learned High Court judge did not err when he concluded that there was a negotiation for the sale of the drugs between the appellant and Busra.

[53] The evidence of Busra showed that he was introduced to the appellant by Zaki. Earlier on, Zaki was introduced to Busra by the informer. It must be recalled that during the first meeting, Busra testified that he and the appellant

had a discussion about the drugs to be supplied specifically heroin. It was during this first meeting that the appellant told Busra that the price of heroin was RM11,000 for one pound and if Busra were to purchase more than one pound, the appellant would be willing to reduce the price to RM10,000 per pound. Busra testified that although the informer and Zaki were present, both of them did not participate in the negotiation.

[54] 11 days later during the second meeting, Busra discussed with the appellant regarding the supply of the drugs together with the price as well as the place of delivery. Again, on this second occasion, the informer and Zaki were merely present and they did not take part in any of the discussions. It was during this second meeting that Busra and the appellant exchanged telephone Nos and thereafter the appellant kept in touch with Busra via telephone.

[55] It is crystal clear that through the evidence of Busra, the informer and Zaki were not active participants in the negotiations between Busra and the appellant and they merely served as introducers only.

[56] In our judgment, there is no necessity for the prosecution to call the informer or Zaki as its witnesses to prove its case under the charge or even to make them available to the defence (see *Wan Yurillhami bin Wan Yaacob & Anor v Public Prosecutor* [2010] 1 MLJ 749; [2010] 1 CLJ 17). The adverse inference under s 114(g) of the Evidence Act 1950 should not be invoked against the prosecution for the non-calling of these personalities.

[57] In our judgment, the role played by the informer did not go beyond introductions and, consequently, the informer is protected under s 40 of the DDA and does not have to be called as a witness since he did not metamorphose into an agent provocateur. Section 40 of the DDA offers protection to informers generally. Section 40(1) of the DDA provides that no witness shall be obliged or permitted to disclose the name or address of any informer or state any matter which might lead to his discovery. And whether a person is an informer or an agent provocateur is purely a matter of fact (*Munusamy v Public Prosecutor*).

[58] In our judgment, both the informer and Zaki did not play any role whatsoever in determining the price of the drugs to be supplied by the appellant to Busra nor were they privy to the date when the supply of the drugs would take place nor were they aware as to the amount of the drugs that the appellant would be supplying to the appellant. And when the drugs were delivered to Busra by the appellant, both the informer and Zaki were not present.

[59] Furthermore why should there be a need for the prosecution to call

Detective Corporal Rosniwati bt Remle and Detective Lance Corporal Mohd Rizal bin Othman as witnesses for the prosecution. In our judgment, it is not necessary to call them. The evidence of Busra is sufficient. It is solid as the rock of Gibraltar. Busra is an agent provocateur. He is a special witness. Busra has to be called and he was called as prosecution witness number four — SP4. If Busra was not called nor offered to the defence, the whole of the prosecution's case would collapse like a deck of cards, so to speak (see *Ti Chuee Hiang v Public Prosecutor* [1995] 2 MLJ 433).

[60] Section 40A(1) of the DDA provides that no agent provocateur shall be presumed to be unworthy of credit by reason only of his having attempted to abet or abetted the commission of an offence if the attempt to abet or abetment was for the sole purpose of securing evidence against the appellant. It was Inspector Saifulazre who directed Busra to be an agent provocateur. All the feedbacks which Busra obtained, he would report to the said Inspector. Even during the final briefing at R & R Juru by SP5, Busra was also directed to be an agent provocateur. As an agent provocateur, the evidence of Busra need no corroboration to found a finding of guilt against the appellant (*Public Prosecutor v Mohamed Halipah* [1982] 1 MLJ 155).

[61] Norliza bt Che Embi ('SP12'), an associate of the investigation unit of Digi Telecommunications Sdn Bhd gave evidence for the prosecution pursuant to s 90A of the Evidence Act 1950. Under that section, a statement in a computer record is admissible as evidence of the facts contained therein provided it was recorded in the course of its ordinary use. SP12 who is responsible for the operation of the computer gave a certificate stating that to the best of her knowledge and belief it was made in the course of its ordinary use. SP12's certificate can be seen at p 226. At p 227, the appellant's telephone No was listed as 016 4704434. While Busra's telephone No was revealed during the cross-examination of the appellant as 019 5570718. We have evidence that the appellant did telephone Busra on many occasions and according to Busra these telephone calls were related to the supply of the drugs by the appellant to Busra. We will now list the respective dates and time of those calls. We are grateful to learned deputy public prosecutor in the person of Madam Shoba Venu Gobal for highlighting those telephone calls made by the appellant to Busra:

(a) on 9 October 2009 at 1pm (see p 238 of the appeal record at *Jilid* 2);

(b) on 10 October 2009 at 4.36pm (see p 239 of the appeal record at *Jilid* 2);

(c) on 11 October 2009 at 4.30pm (see p 241 of the appeal record at *Jilid* 2);

(d) on 14 October 2009 at 12.42pm (see p 245 of the appeal record at *Jilid* 2);

(e) on 20 October 2009 at 7.58pm (see p 250 of the appeal record at *Jilid* 2);

(f) on 20 October 2009 at 8.39pm (see p 250 of the appeal record at *Jilid* 2);

(g) on 20 October 2009 at 10.49pm (see p 250 of the appeal record at *Jilid* 2);

(h) on 22 October 2009 at 4.25pm (see p 251 of the appeal record at *Jilid* 2);

(i) on 22 October 2009 at 4.25pm, at 5.39 pm, at 6.17pm, at 6.37pm, at 6.38pm, at 6.57pm, at 7.01pm, at 7.08pm and at 7.15pm (see p 252 of the appeal record at *Jilid* 2); and

(j) on 22 October 2009 at 7.20pm, at 7.21pm, at 7.32pm, at 7.36pm, at 7.43pm, at 7.53pm, and at 8pm (see p 253 of the appeal record at *Jilid* 2).

[62] All these telephone calls showed that the appellant had knowledge that he was supplying drugs to Busra on the date, time and place as listed in the charge. The prosecution has succeeded in proving that the appellant was in possession of the drugs contained in the brown coloured envelope. And since the appellant was in posession of the drugs in the said envelope, he was in a position to traffic in those drugs (*Public Prosecutor v Chia Leong Foo* [2000] 6 MLJ 705; [2000] 4 CLJ 649; *Pendakwa Raya v Nik Ahmad Aman bin Nik Mansor* [2002] 5 MLJ 641; [2002] 2 AMR 2515; and *Public Prosecutor v Johar bin Mustafa* [2003] MLJU 342; [2004] 5 CLJ 187).

[63] When arrested, the appellant had the brown coloured envelope containing the drugs in his right hand and he was struggling to free himself but was finally subdued. His conduct showed that he knew that the said envelope contained drugs and the learned High Court judge was entitled to draw the inference that the appellant had actual possession or mens rea possession (*Director of Public Prosecutions v Brooks* [1974] 2 All ER 840). We will expand on this point when dealing with the second issue shortly.

THE SECOND ISSUE

[64] The evidence adduced by the prosecution showed that an agent provocateur in the person of Busra was used to negotiate with the appellant for the buying and selling of the drugs. This was recognised by the learned High Court judge in his judgment at p 120 of the appeal record at *Jilid* 1 and the relevant passage in His Lordship's judgment has been reproduced in the early part of this judgment.

[65] Now, at p 121 of the appeal record at *Jilid* 1 as reproduced earlier, the learned High Court judge stated that in the alternative the appellant had actual possession of the drugs. And when His Lordship employed the phrase 'actual possession', it meant that His Lordship was satisfied that the appellant had custody and control and the necessary knowledge of the drugs in the brown

coloured envelope which he held in his right hand and then put it on top of his head and was walking towards Busra. As soon as the appellant was nearing Busra, the appellant then used both of his hands and took the said envelope and handed it to Busra. Read against the background of negotiations to supply the drugs to Busra and the numerous telephone calls made by the appellant to Busra, the learned High Court judge was right in his finding that there was actual possession or mens rea possession and His Lordship then invoked the presumption of trafficking under s 37(da) of the DDA bearing in mind the weight of the drugs. In our judgment, what His Lordship did was correct and there was no error at all.

[66] On the facts, the appellant certainly had physical capacity to deal with the brown coloured envelope containing the drugs to the exclusion of everyone else. The appellant also had dominion of the said envelope containing the drugs and he was mentally conscious that he had the necessary power to dispose off the drugs to whoever he was inclined to. Since the appellant had possession of the drugs, he was in a position to traffic in those drugs. And when he did it, he must be held criminally accountable.

[67] We see nothing wrong in the approach taken by the learned High Court judge. The appellant's argument that by invoking the trafficking presumption under s 37(da) of the DDA, the learned High Court judge had contradicted his earlier finding that the evidence of trafficking had been proved is misplaced. After the prosecution had adduced its evidence in court and in the course of assessing the evidence, His Lordship has to ascertain whether an actual case of trafficking or a presumed case of trafficking had been proved. What His Lordship did at this stage was merely to ascertain the mode of proof adopted by the prosecution to prove its case.

[68] At this juncture, it would be ideal to refer to the Federal Court case of *Public Prosecutor v Sa'ari bin Jusoh* [2007] 2 MLJ 409 at p 427; [2007] 2 CLJ 197 at pp 224–225 of the report, the Federal Court had this to say:

> (13) The objection of learned counsel to the use of the presumption of trafficking against the accused was not supported by particulars of the prejudice that the defence may suffer. Neither did the prosecution comment on this aspect of the defence submission. The task therefore falls on us to determine whether the accused will suffer any prejudice if the presumption of trafficking is invoked against the accused. The activation of the presumption of trafficking under s 37(da) of the Act requires proof of actual possession of the dangerous drugs by the prosecution. In the opening address there is no mention of possession of the dangerous drugs by the accused. It only refers to the arrangement made between the accused and PW7 for the sale of the drugs. However, the evidence adduced by the prosecution shows that the accused was in actual possession of the drugs. The notes of evidence reveal that witnesses who testified on this issue were cross-examined by the defence. When the

accused was called upon to enter his defence he declined to recall any of the prosecution witnesses. In this regard the notes of evidence at *Jil* 2 p 128 reads as follows:

> (Peguam tertuduh memaklum ia tidak bercadang memanggil semula mana-mana saksi pendakwa).

The examination-in-chief of the accused was wholly on the fact that the bag which contained the dangerous drugs was carried by one Ismail and not him. In his cross-examination he denied that he negotiated for the sale of the drugs with PW7. The examination-in-chief of his witness Mohd Saupi bin Jusoh (DW2) was also only on the question of possession. The submission of the defence at the end of the case was also only on the issue of possession of the bag containing the dangerous drugs. The facts that the accused cross-examined the prosecution witnesses on the issue of possession; that he was given an opportunity to recall witnesses for the prosecution and that his defence was one of negating possession mean that he will not be prejudiced as a result of a conviction based on possession. Accordingly the presumption of trafficking under s 37(da) of the Act can be invoked against the accused as there is evidence of actual possession.

[69] Factually speaking, *Sa'ari Jusoh*'s case is almost similar to the present appeal. There an agent provocateur was used to prove direct trafficking. And one of the issues raised in that case was whether a conviction can be founded on the presumption of trafficking when all along the prosecution's case was on actual trafficking. At p 427(MLJ); p 224 (CLJ) of the report, the Federal Court gave its answer in the positive and this was what the Federal Court said:

> There will also be no prejudice to the accused if the case was conducted by the defence and or by the prosecution on the line of the new basis for conviction. In short the determinative factor is whether the defence has had the opportunity to meet the new basis for conviction. A similar test is also applicable when the prosecution leads evidence to which no reference has been made in the opening address. It follows that it cannot be automatically excluded as done in cases such as *Public Prosecutor v Kang Choo Heng & Anor* [1991] 3 CLJ 2574; [1991] 3 CLJ (Rep) 545 and *Pendakwa Raya v Norfaizal* [2008] 7 MLJ 792; [2003] 8 CLJ 581 without any consideration of the element of prejudice. Where the procedures just described have not been followed the burden will be on the defence to show the manner in which it has been prejudiced followed with a reply by the prosecution.

CONCLUSION

[70] There are no substantial and compelling reasons for us to disagree with the finding of facts by the learned High Court judge.

[71] There are no appealable errors. It is safe to convict the appellant. The defence of the appellant had fallen far short of rebutting the presumption of

trafficking on the balance of probabilities and it had also not raised a reasonable doubt as to the appellant's guilt which the prosecution had established beyond reasonable doubt.

[72] There are no merits in this appeal. We dismissed the appeal. The conviction and sentence passed by the High Court are hereby affirmed.

Appeal dismissed; sentence and conviction of the High Court affirmed.

Reported by Ibnu Aswan